Office-Supreme Court, U.S.
FILED
JUN 10 1981
ALEXANDER L. STEVAS,
CLERK

80-2078

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

C. STEPHEN HOWARD,
Counsel of Record,

MERLIN W. CALL,
MILES N. RUTHBERG,
WILLIAM C. SCHWEINFURTH,
JEFFREY M. HAMERLING,

TUTTLE & TAYLOR INCORPORATED,
609 South Grand Avenue,
Los Angeles, Calif. 90017,
(213) 683-0600,

Attorneys for Petitioner,
Dames & Moore.

Of Counsel:

STANLEY C. FICKLE,
Indiana University School of Law,
Bloomington, Indiana 47401,
(812) 337-7272.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented for Review.

1. Whether the President has statutory or inherent constitutional authority to settle legally enforceable claims of American citizens against foreign states, agencies, and controlled entities pending in United States courts and nullify judgments of United States courts adjudicating such claims?

2. Whether the President has statutory or inherent constitutional authority to nullify attachment liens and judgment liens imposed by process of United States courts on property of foreign states, agencies, and controlled entities to secure or satisfy legally enforceable claims and judgments of American citizens and to order the transfer of such property out of the reach of process of United States courts?

3. Whether Presidential action substantially diminishing or destroying the value of legally enforceable claims of American citizens against foreign states, agencies, and controlled entities is an unconstitutional taking of property?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, Executive Agreements, Executive Orders, and Regulations Involved	2
Statement of the Case	3
Reasons for Seeking Review Before Judgment by the Court of Appeals	9
Reasons for Granting the Writ	10
Conclusion	25

TABLE OF AUTHORITIES

Cases	Page
American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir., decided May 22, 1981) ..	13
Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir., decided May 22, 1981)	13
Guessefeldt v. McGrath, 342 U.S. 308 (1952)	24
Miller v. United States, 583 F.2d 857 (6th Cir. 1978)	17
Propper v. Clark, 337 U.S. 472 (1949)	20, 23
United States v. Belmont, 301 U.S. 324 (1937) ..	14, 15
United States v. La Abra Silver Mining Co., 29 Ct. Cl. 432 (1894)	17
United States v. Pink, 315 U.S. 203 (1942)	14, 15
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	14, 15
United States ex rel. Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954) cert. denied, 348 U.S. 952 (1955)	17
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	11, 12, 19
Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470 (1941)	16
Zittman v. McGrath, 341 U.S. 470 (1951) ...	20, 23, 24

Page

Constitutional Provisions, Statutes, and Rules

U. S. Const., Art. I, §§ 1, 8 2
U. S. Const., Art. II, § 2 ..... 2, 12
U. S. Const., Art. III, §§ 1, 2 2
U. S. Const., Art. VI 2
U. S. Const., Amend. I 2
U. S. Const., Amend. V 2
Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* 2, 5
International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* 13, 21
International Emergency Economic Powers Act, 50 U.S.C. § 1702(a) 24, 25
Trading with the Enemy Act, Sec. 5(b) 20, 21, 22, 23, 24
3 U.S.C. § 301 2
22 U.S.C. § 1732 2
28 U.S.C. § 1254 2
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1330 5
28 U.S.C. §§ 1330-1332 2
28 U.S.C. § 1331 4
28 U.S.C. § 1391 ..... 2, 5
28 U.S.C. § 1603 5
28 U.S.C. § 1605 5
28 U.S.C. § 1606 ..... 15, 18
28 U.S.C. §§ 1609-1611 18
28 U.S.C. § 1651 ..... 2, 4

	Page
28 U.S.C. § 2201	4
28 U.S.C. §§ 2201-2202	2
50 U.S.C. § 1631	2
50 U.S.C. App. §§ 1 *et seq.*	20
50 U.S.C. App. § 5(b)(1)	25
50 U.S.C. App. § 7	22
50 U.S.C. App. § 9	22
50 U.S.C. App. § 9(a)	22, 23
50 U.S.C. App. § 34	20, 22, 23
50 U.S.C. App. § 34(a)	23
Fed. R. Civ. P. 12(b)(6)	4
Fed. R. Civ. P. 54	2
Fed. R. Civ. P. 54(b)	5
Fed. R. Civ. P. 56	2
Fed. R. Civ. P. 62(c)	9
Fed. R. Civ. P. 64	2, 5
Fed. R. Civ. P. 69	2
Rules of United States Supreme Court, Rule 18	10

Executive Orders, Regulations, and Executive Agreements

Exec. Order No. 12,279	7, 8, 12
Exec. Order No. 12,279-12,281	2
Exec. Order No. 12,280	7, 8
Exec. Order No. 12,281	7, 8
Exec. Order No. 12,294	2, 8, 20
Iranian Assets Control Regulations, 31 C.F.R. Part 535	2, 3
31 C.F.R. § 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____)	3

Page

31 C.F.R. § 535.214 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,447) 3

31 C.F.R. § 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.222 (46 Fed. Reg. 14,335) 3

31 C.F.R. § 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,447) 3

31 C.F.R. § 535.579 (46 Fed. Reg. 14,336) 3

International Agreements

Settlement of Claims of U.S. Nationals, 1960, Poland-U.S., 11 U.S.T. 1953, T.I.A.S. No. 4545 16

Settlement of Claims, 1973, Hungary-U.S., 24 U.S.T. 522, T.I.A.S. No. 7569 16

Claims of U.S. Nationals, 1976, Egypt-U.S., 27 U.S.T. 4214, T.I.A.S. No. 8446 16

Settlement of Claims, 1979, People's Republic of China-U.S., 30 U.S.T. 1957, T.I.A.S. No. 9306 .. 16

Miscellaneous

95 Congressional Record, 8833, 8837-8838 (1949) ... 16

H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) 21, 24, 25

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-9, 26-27, reprinted (1976) U.S. Code Cong. & Ad. News 6605, 6605-07, 6611, 6625-26 ..... 15, 18

Page

Lillich, The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump-Sum Agreement, 69 Am. J. Int'l. L. 837, 845 (1975) 16

Regulations in Publication

Treasury Department Release of June 4, 1981 Setting Forth Further Amendments to Iranian Assets Control Regulations, 31 C.F.R. Part 535 3

No. . . .

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERCA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

The Petitioner, Dames & Moore, respectfully prays that a writ of certiorari issue to review before judgment the case of *Dames & Moore, Appellant, v. Donald T. Regan, The Secretary of the Treasury of the United States of America, and The United States of America, Appellees,* now in the United States Court of Appeals for the Ninth Circuit, Case No. 81-5450.

Opinions Below.

The Order of the United States District Court for the Central District of California sought to be reviewed is unreported. It is set out in the Appendix to this Petition (the "Appendix") at A-106. No opinion was issued by the Dis-

trict Court, but a Memorandum relating to the District Court's Order was issued. That Memorandum is set out in the Appendix at A-161. No judgment or opinion has been issued by the Court of Appeals.

Jurisdiction.

The Order sought to be reviewed is an order of the United States District Court for the Central District of California filed May 28, 1981, entered June 2, 1981, in the action known as *Dames & Moore v. Donald T. Regan*, United States District Court for the Central District of California, No. CV 81-2064 LEW (Px) (the "Action Below"). Notice of Appeal from that Order to the United States Court of Appeals for the Ninth Circuit was filed in the District Court on June 3, 1981 (Appendix at A-163), and the appeal was docketed in the Court of Appeals on June 4, 1981, as *Dames & Moore v. Donald T. Regan*, No. 81-5450. (Appendix at A-162.) Jurisdiction is conferred on this Court to review the appeal now pending in the United States Court of Appeals for the Ninth Circuit, prior to judgment, under 28 U.S.C. Section 1254(1).

Constitutional Provisions, Statutes, Executive Agreements, Executive Orders, and Regulations Involved.

This case involves the following constitutional provisions, statutes, executive agreements, executive orders, and regulations: U.S. Const. art. I, §§ 1, 8, art. II, § 2, art. III, §§ 1, 2, art. IV, amend. I, amend. V; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.*; 3 U.S.C. § 301; 22 U.S.C. § 1732; 28 U.S.C. §§ 1254, 1330-1332, 1391, 1651, 2201-2202; 50 U.S.C. § 1631; Fed. R. Civ. P. 54, 56, 64, 69; Executive Orders 12,279-12,281, 12,294; Iranian Assets Control Regulations,

31 C.F.R. Part 535, §§ 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ...), 535.214 (46 Fed. Reg. 26,477, as amended by 46 Fed. Reg. ...), 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477), 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,447), 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ...), 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ...), 535.222 (46 Fed. Reg. 14,335), 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,477), 535.579 (46 Fed. Reg. 14,336); Treasury Department Release of June 4, 1981, setting forth amendments, in publication, of the Iranian Assets Control Regulations, 31 C.F.R. Part 535; the Declaration of the Government of the Democratic and Popular Republic of Algeria; and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. The pertinent texts of the foregoing are set forth in the Appendix.

Statement of the Case.

On April 28, 1981, Petitioner filed the Action Below, in the United States District Court for the Central District of California, for injunctive and declaratory relief against The Secretary of the Treasury of the United States and The United States (hereinafter jointly referred to as the "Government"), seeking (1) a preliminary and permanent injunction enjoining the Government from interference with proceedings in, or related to, an action by Petitioner in the same court known as *Dames & Moore v. Atomic Energy Organization of Iran*, United States District Court for the Central District of California, No. CV 79-04918 LEW (Px) (hereinafter the "Underlying Action"), and (2) a declaratory judgment that the so-called "Algerian Declara-

tions," and the executive orders and regulations purporting to implement said Declarations, to the extent that they purported to authorize such interference in the Underlying Action, were beyond the constitutional and statutory powers of the President and therefore void. The Complaint in the Action Below is set out in full in the Appendix at A-1. Jurisdiction was invoked under 28 U.S.C. Sections 1331, 1651, and 2201. Concurrently with the filing of the Complaint, Petitioner moved for a preliminary injunction on its claim for injunctive relief.

On May 12, 1981, the Government cross-moved to dismiss Petitioner's Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted upon the ground that the Presidential acts in issue were within the President's constitutional and statutory powers. Copies of the Government's motion and supporting memorandum are set forth in the Appendix at A-88 and A-90, respectively.

The cross-motions of the parties were disposed of by the District Court in a consolidated Order, filed May 28, 1981, entered June 2, 1981, involving three other actions. (Appendix at A-106.) In its Order, the District Court denied Petitioner's motion for a preliminary injunction and granted the Government's motion to dismiss for failure to state a claim upon which relief may be granted. The District Court based its rulings on the arguments made by the Government in its motion to dismiss and supporting memorandum. (Appendix at A-161.) It is from these rulings of the District Court that Petitioner has appealed to the Court of Appeals; and it is that appeal which Petitioner asks this Court to accept for review.

Petitioner's verified Complaint in the Action Below alleged as part of its factual basis certain salient facts concerning the Underlying Action. That suit, to collect approximately $3,500,000 in unpaid invoices, had been filed

by Petitioner on December 19, 1979, against the Atomic Energy Organization of Iran (the "AEOI"), the State and Government of Iran ("Iran"), and some twenty-eight Iranian banks that had been nationalized during the Iranian revolution (the "Bank Defendants"). Personal jurisdiction over the defendants, subject matter jurisdiction, and venue in the Underlying Action were based upon 28 U.S.C. Sections 1330 and 1391, and certain provisions of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. §§ 1602, *et seq.*, specifically 28 U.S.C. Sections 1603 and 1605.

The Complaint in the Action Below further alleged, with respect to the Underlying Action, that on December 20, 1979, January 4, 1980, February 4, 1980, and May 12, 1980, pursuant to Rule 64 of the Federal Rules of Civil Procedure and applicable attachment law of California, the District Court had issued writs of attachment directed against the property of the defendants, that those writs were served on various third parties by the United States Marshal, and that property of certain of the Bank Defendants was thereby attached as security for any ultimate judgment that might be entered.

The Complaint in the Action Below further alleged, with respect to the Underlying Action, that on February 18, 1981, the District Court had entered final judgment in favor of Petitioner against defendants the AEOI and Iran in the amount of $3,788,930.79 plus interest and that the Underlying Action was still pending against the Bank Defendants.[1] The Complaint in the Action Below further alleged that

---

[1]A separate final judgment was entered against the AEOI and Iran under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. On March 20, 1981, the AEOI and Iran noticed an appeal from this judgment but did not at the time seek any stay of execution on the judgment.

efforts to execute on the judgment in the Underlying Action by levying on Iranian property had been commenced by Petitioner in the State of Washington, that in March 1981 the Superior Courts of Clark and Snohomish Counties, State of Washington, had issued writs of execution and garnishment in enforcement of that judgment, and that a sheriff's execution sale of certain Iranian property had been noticed in Clark County, State of Washington.

The Complaint in the Action Below went on to set forth various acts of the President in interference with Petitioner's Underlying Action and Petitioner's attachments, judgment, and judgment levies. These Presidential acts arose out of President Carter's resolution of the 14-month-old hostage crisis with Iran. During the time in which Americans were held hostage, the United States had engaged in a long series of public and nonpublic efforts to secure the release of the hostages, including various negotiations, a proceeding before the International Court of Justice (whose ruling Iran ignored), and an aborted military effort. Finally, on January 19, 1981, President Carter, in his last days of office, entered into two so-called "Algerian Declarations" with the Iranian Government in order to secure the release of the hostages.

Under the Algerian Declarations, President Carter agreed that, in return for Iran's releasing American hostages, the President would undertake, *inter alia*, to terminate all lawsuits of American citizens pending in the United States against Iran and its agencies and controlled entities, nullify all attachments and judgment levies issued by United States courts against Iranian property, and transfer out of the country all Iranian property here (estimated at $4,000,000,000), notwithstanding present or future attachment liens or judgment levies against those assets. At the time, several hundred lawsuits against Iranian defendants, of which

Petitioner's Underlying Action was typical, were pending in courts around the United States.

As part of the Algerian Declarations, the President and Iran agreed to set up an Arbitral Tribunal, to be funded initially with $1,000,000,000 of Iranian assets, to which some, but not all, of the current United States plaintiffs might present their claims. Claims based on contracts with certain forum selection clauses favoring Iran would not be within the Tribunal's jurisdiction. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II, reprinted in the Appendix at A-30.[2] It has been estimated that claims eligible for the Tribunal aggregate $3,000,000,000 to $4,000,000,000. Whether the Tribunal will function at all, when (if ever) it will complete its work, and whether it will be funded by Iran beyond the initial $1,000,000,000 are all uncertain at this time.

On the morning of January 20, 1981, President Carter issued a series of executive orders implementing the Algerian Declarations. Among these orders, Executive Order Nos. 12,279, 12,280, and 12,281 purport to nullify attachments on all Iranian property remaining in this country. (Appendix at A-43.) Executive Order Nos. 12,279 and

---

[2]The Complaint in the Action Below alleged that the contract in the Underlying Action provides:

> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

12,280 order persons holding funds or securities of Iran or its agencies, instrumentalities, or controlled entities, to transfer such property to the Federal Reserve Bank of New York. New regulations under these executive orders require such transfer under pain of criminal penalties by noon on June 19, 1981. In addition, Executive Order No. 12,281 orders persons holding Iranian property other than funds or securities to transfer the same as directed by Iran. Such direction could presumably come from Iran at any time.

Executive Order Nos. 12,279, 12,280, and 12,281 further purport to grant a "full acquittance" to persons who transfer Iranian property in compliance with those orders and in violation of judicial orders or other court processes. In addition, these executive orders purport to prohibit United States litigants from acquiring new interests in Iranian property now in the United States. Thus, any United States litigant (such as Petitioner) obtaining a judgment from a United States court is prohibited from levying that judgment against any Iranian property now in the United States.

On February 24, 1981, after entry of final judgment against the AEOI and Iran in Petitioner's Underlying Action, President Reagan, who had inherited the Algerian Declarations from President Carter, issued Executive Order No. 12,294 which purported to "suspend" all claims of United States citizens, pending in court or otherwise, "which may be presented to the Iran-United States Claims Tribunal . . . ." (Appendix at A-52.) The "suspension" becomes a "discharge" unless the Tribunal finds that it has no jurisdiction or Iran fails to pay any award made by the Tribunal. Also on February 24, 1981, the Department of the Treasury released elaborate regulations implementing the various executive orders. (*See* Appendix at A-55 through A-86.)

Because these various Presidental acts were interfering with Petitioner's prosecution of the Underlying Action, including Petitioner's attachments, judgment, and judgment levies, Petitioner filed the Action Below to enjoin the Government and obtain a judicial declaration of Petitioner's rights. On the facts alleged in Petitioner's verified Complaint and the motions and briefs of the parties, the District Court issued its Order of May 28, 1981 in the Action Below denying Petitioner preliminary injunctive relief and dismissing Petitioner's Complaint for failing to state a claim for relief.[3] After Petitioner noticed and docketed its appeal from these rulings, Petitioner moved under Federal Rules of Civil Procedure Rule 62(c) to enjoin the Government, pending appeal, from transferring, or requiring others to transfer, Iranian property subject to Petitioner's attachments and judgment levies. That motion was granted and an injunction pending appeal issued on June 8, 1981. (Appendix at A-167.) Petitioner now asks this Court to review its appeal prior to judgment by the Court of Appeals.

Reasons for Seeking Review Before Judgment by the Court of Appeals.

A Petition for a Writ of Certiorari to review a case pending in the Court of Appeals before judgment will be granted by this Court "only upon a showing that the case is of such imperative public importance as to justify the deviation from

---

[3]Based upon the Court's conclusions reached in the Action Below, the District Court concurrently granted a motion by the Government to stay the judgment previously entered in the Underlying Action on February 18, 1981, stayed further proceedings in the Underlying Action (still pending against the Bank Defendants), and vacated all attachments in the Underlying Action but stayed its order vacating attachments until July 19, 1981. (Appendix at A-106.) By order filed and entered June 8, 1981, in the Underlying Action, the District Court specified that its stay of Petitioner's judgment was only a stay of execution pending appeal.

normal appellate practice and to require immediate settlement in this Court." U.S. Sup. Ct. R. 18.

As set forth in the following section of this Petition, the issues raised here involve novel, fundamental questions of law going to the core of the government that our Constitution creates — its allocation and separation of powers among the executive, legislative, and judicial branches. Billions of dollars, as well as delicate constitutional principles, are at stake. This is a case of imperative public importance.

If the Court is to accept an Iranian case for review, it must do so now, without awaiting a judgment from the Court of Appeals. For, in the absence of this Court's accepting an Iranian case for review, the Government will require all persons holding Iranian funds and securities to transfer those funds and securities to the Federal Reserve Bank in New York by 12:00 noon on June 19, 1981 under pain of criminal penalties. Moreover, unless the Court accepts an Iranian case for review, the Government apparently intends to transfer all Iranian funds and securities out of the country, and out of the reach of United States court process entirely, by July 19, 1981, thus rendering major issues presented in the Iranian cases academic, if not moot.[4]

Reasons for Granting the Writ.

In service to the obviously praiseworthy objective of obtaining the release of American citizens held hostage by Iran, President Carter in his last days in office used legal rights and property interests of American citizens as bargaining chips in negotiating an executive agreement with

---

[4]As of this writing, the Government has been enjoined by the District Court pending appeal from transferring, or requiring others to transfer, Iranian property attached or levied on by Petitioner. Whether the Government will seek review of that injunction in the Court of Appeals or in this Court is not known by Petitioner.

a foreign power. The agreement made by the President severely and adversely affects those private rights and interests. Statutory rights to have claims heard in American courts with their procedural safeguards are forfeited. Attachments of assets to secure final satisfaction of judgments are abrogated. Judicial determinations previously obtained in American courts — including, in Petitioner's case, a federal district court judgment — are wiped out. And an unknown number of Americans — Petitioner possibly among them — do not even receive in return the uncertain value of asserting their claims before the Arbitral Tribunal. Petitioner stands to lose a judgment against two parties, levies on Iranian property in enforcement of that judgment, and several attachments against property of the other parties against whom the Underlying Action is still pending.

While there are a variety of subsidiary questions raised by the President's actions here, the core issues are these: Does the President in conducting foreign affairs have inherent constitutional authority to commandeer and forfeit legal rights and property interests of private citizens when he deems it to be in the interest of broader foreign policy objectives? If not, does any statute confer such authority on the President? Everyone would agree that the President had no unilateral authority to order payment of money to Iran from the United States Treasury in order to secure the hostages' release. Did he nevertheless have authority to direct a similar result by bargaining away legal rights and property interests of private American citizens?

When President Truman, in service to the no less praiseworthy objective of protecting the Nation's defense capability in a time of armed conflict, ordered the temporary seizure of the American steel industry, this Court determined that such action was constitutionally invalid in the absence of congressional approval. *See Youngstown Sheet & Tube*

Co. v. Sawyer, 343 U.S. 579 (1952). No such authority to deal with the rights and property interests of American citizens was found inherent in the President's explicit constitutional powers as Commander-in-Chief. *See* U.S. Const. art. II, § 2. In part, the instant case presents similar issues regarding the inherent powers of the President to conduct foreign affairs. In another respect, however, this case presents issues beyond *Youngstown* because an integral aspect of the exercise of executive power undertaken here effectively abrogates judicial proceedings and orders authorized by Congress.[5]

In justification of the President's actions, the Government has asserted two primary propositions. First, the Government contends that the President has the inherent power under Article II of the Constitution to "settle" (or to enact a "new rule of law" to govern) any and all claims by American citizens against foreign states, agencies or controlled entities — that is to say, the claims of Americans against foreign countries and agencies are the property of the President to do with as he will in the conduct of foreign policy. From this extreme proposition the Government argues, not entirely without logic, that if the President can treat such claims as his own, he can take the various steps that he took here.

The Government's second proposition is that, in addition to the purported unlimited power of the Executive to settle

---

[5]As a dramatic illustration of the clash of authority between the coordinate branches of the federal government, the executive orders in issue purport to immunize from sanction individual actions undertaken in compliance therewith, nowithstanding that such action may be in violation of court order. Indeed, the Executive Branch has threatened individuals with civil and criminal sanctions for noncompliance with these executive orders even though they require acts in violation of court orders. *Compare, e.g.*, Exec. Order No. 12,279, 46 Fed. Reg. 7,919 (1981) (reprinted in Appendix at A-43) *with* Treasury Department Release of June 4, 1981 (reprinted in Appendix at A-151).

claims of Americans against foreign countries and agencies, he is authorized by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.* (''IEEPA''), to abrogate the rights of American citizens under writs of attachment and execution against Iranian property securing satisfaction of judgments that Americans obtain on their claims and to remove such property from the United States for the benefit of the foreign country, notwithstanding judicial attachments and judgment levies to the contrary. Thus, the Government argues secondarily that, apart from any inherent constitutional authority to ''settle'' Americans' claims against foreign countries and agencies, Congress has authorized the President to render those claims largely academic by removing from this country the property of foreign countries and agencies subject to judicial liens. This interpretation of IEEPA, Petitioner submits, stands the statute on its head by treating a statute expressly designed to limit Presidential power to be one that greatly expands it.[6]

The Government bases its sweeping proposition regarding the Executive's inherent authority to dispose of, or ''settle,'' the legal claims of American citizens on an alleged long line of precedent. But analysis of the Government's cases reveals that there is no decision of this Court — nor any established body of decisional law in lower federal courts — that even remotely supports the actions taken by the President in this case as being within his inherent constitutional authority. The Government's argument rests upon citation of, and selective quotation from, cases and sec-

---

[6]The Government's arguments have met with success in *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., decided May 22, 1981), and *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., decided May 22, 1981). But, for the reasons herein outlined, Petitioner submits that those cases have been wrongly decided and should not stand.

ondary authorities that are largely or entirely inapplicable — they concern statutes not involved here or address factual circumstances and legal contexts far different from those now presented.

For instance, neither *United States v. Pink*, 315 U.S. 203 (1942), nor *United States v. Belmont*, 301 U.S. 324 (1937), involved interference with claims of United States citizens, whether pending before a court or not; indeed, both cases upheld the ability of the United States, as the assignee under the Litvinov Assignment, to marshal local assets for the benefit of local creditors before the claims of alien creditors were realized. The goal of the Executive in these cases was to maximize the ability of United States citizens to recover claims against the foreign state. Moreover, the issue before the Court in both *Pink* and *Belmont* was not the Executive's authority to settle the claims of United States citizens, but rather the scope of executive power to recognize foreign regimes and decrees and the effect of the exercise of such power, under the Supremacy Clause, on inconsistent provisions of state law.

The decision in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), adds little to the discussion of the Executive's unilateral authority to settle pending domestic commercial claims against foreign states. There the Court found that an intervening treaty, representing the judgment of two coordinate branches of government, defeated the wartime claims of the United States and the prize rights of the men of a "public armed vessel" of the United States. *Id.* at 103-09. Moreover, the validity of the treaty was not

at issue. *Id.* at 109. Accordingly, *Schooner Peggy* is largely irrelevant here.[7]

In addition to *Pink*, *Belmont*, and *Schooner Peggy*, the Government, in support of the purported authority to settle these claims, adverts to an alleged historical practice of executive agreements of the kind involved here and alleged congressional acquiescence in that practice. This contention is fundamentally flawed because claims settled under past executive practice were plainly dissimilar to those at issue here and, in any event, largely unenforceable by United States claimants in the courts of this country.

Historically, claims of American nationals against a foreign state or its agencies were necessarily resolved, if at all, by the Executive Branch through agreement with the foreign power because the claimant, under the absolute theory of sovereign immunity, had no enforceable remedy in United States courts.[8] Even after judicial recognition of the restrictive theory of sovereign immunity, whether the foreign power could be sued rested on the discretion of the Executive.[9] Even if suit was allowed, execution on property of

---

[7]*Schooner Peggy* is cited by the Government in support of its contention that the Algerian Declarations created a "new rule of substantive law." The Government adopted this argument in rejoinder to contentions by United States claimants that the Declarations had divested Article III courts of jurisdiction vested in them by Congress under the FSIA. However, Petitioner questions what new rule of substantive law has been created by the Executive? The law of contracts on which Petitioner's Underlying Action is based was not altered. The only possible "rule of law" that has been altered by the Executive is the FSIA which expressly states that all foreign states not immune from suit "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. By attempting to change the provisions of a federal statute, the Executive's action presents serious constitutional issues concerning the separation of powers between the Executive, Congress and the Judiciary.

[8]*See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-9, 26-27, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605-07, 6625-26 ("FSIA Report").

[9]*See id.*

foreign powers in this country was not available.[10] Quite understandably, therefore, claims against foreign countries came to be regarded as those that the President could settle in his own discretion because their resolution and satisfaction depended solely on the Executive's ability to negotiate with the foreign power and its willingness to do so in a given case or class of cases. It followed that claimants were viewed as beneficiaries of the various settlement agreements made by the Executive.[11]

Moreover, many of the prior settlement agreements involve claims much different from those now cognizable in the courts and enforceable without executive aid; for example, foreign nationalizations and expropriations,[12] and war claims and other losses[13] for which recovery by United States claimants, without executive intervention, was, and still is, largely unavailable. In contradistinction to these types of claims, however, Petitioner's case involves a com-

---

[10]*See id.*

[11]*See* Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump-Sum Agreement*, 69 Am. J. Int'l. L. 837, 845 (1975).

[12]Settlement of Claims, 1979, People's Republic of China-U.S., 30 U.S.T. 1957, T.I.A.S. No. 9306 (final settlement of "the claims of the USA and its nationals . . . against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA," Art. I(a)); Claims of U.S. Nationals, 1976, Egypt-U.S., 27 U.S.T. 4214, T.I.A.S. No. 8446 (lump sum settlement for "nationalization or expropriation," Art. II); Settlement of Claims, 1973, Hungary-U.S., 24 U.S.T. 522, T.I.A.S. No. 7569 (settlement of claims arising from debts, nationalization and other takings); Settlement of Claims of U.S. Nationals, 1960, Poland-U.S., 11 U.S.T. 1953, T.I.A.S. No. 4545 (settlement of claims for nationalization, expropriations, debts owed by nationalized industries). *See also* 95 Cong. Rec. 8833, 8837-8838 (1949) (discussion of settlement between United States and Yugoslavia: claims settled by lump sum agreement were "American claims for property nationalized or otherwise taken over in Yugoslavia").

[13]*See Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941) (reimbursement of sabotage losses).

mercial dispute, presently enforceable in United States courts, which is not dependent for satisfaction on the will of the Executive.[14]

In sum, the Government is unable to demonstrate legal support — either in the form of judicial precedent or a consistent and relevant pattern of prior executive action — for its contention that the Executive has inherent constitutional authority to settle or dispose of legal claims adversely to the interests of United States citizens in circumstances where the claimant has available a judicially-enforceable right and an effective remedy. Also significant, the Government has not shown support for any inherent power to settle a claim actually pending before an Article III court. Finally, almost all of the Government's judicial authorities predate the enactment of the FSIA. Whatever inherent constitutional authority to settle private claims against foreign governments the President might have in the absence of legislative action in the field, the extent of that authority today must be judged with reference to the legislative directives codified in the FSIA.

With the enactment of the FSIA, the rights of United States claimants to litigate international commercial disputes

---

[14]Thus, in circumstances such as the instant case, where Petitioner has a judicially enforceable remedy and an effective means to secure satisfaction of judgment, the authorities relied on by the Government noting an "unreviewable discretion" in the Executive whether to commit a claim to a settlement agreement are irrelevant: *Miller v. United States*, 583 F.2d 857 (6th Cir. 1978) (government discretion to present private taking claim to Canada under the Boundary Waters Treaty of 1909); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954) (denial of petition for writ of habeas corpus, or, alternatively, mandamus to compel the Secretary of State, under the status of Armed Forces Treaty, to negotiate with France for the release of an American serviceman imprisoned in France for a criminal offense), *cert. denied*, 348 U.S. 952 (1955); *United States v. La Abra Silver Mining Co.*, 29 Ct. Cl. 432, 512-13 (1894) (executive discretion to determine whether claim is meritorious before demanding settlement with foreign state).

against foreign states and their agencies and instrumentalities changed dramatically. Rather than mere beneficiaries of the Executive's willingness and ability to negotiate settlements, United States claimants, under the FSIA, are now able to pursue and enforce their claims against foreign states in United States courts. Furthermore, Congress in the context of international commercial claims, expressly intended that private claimants should no longer be beholden to the Executive's political and diplomatic decisions. Thus Congress expressly provided jurisdiction over commercial claims against foreign states to ensure that a foreign state or entity not immune from suit "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, and that, in appropriate circumstances, assets of the foreign government or its entities within the jurisdiction of United States courts are available for execution of judgment. *Id.* §§ 1606, 1609-1611.

Although there is little indication that Congress considered emergencies such as the Iranian hostage crisis when it enacted the FSIA, it is very clear that Congress did intend to benefit private American claimants by depoliticizing the resolution of commercial disputes and committing them exclusively to the jurisdiction of the courts.[15] Exercising its powers over foreign commerce and the jurisdiction of the lower federal courts,[16] Congress removed from the Executive's authority over foreign affairs the power he previously exercised to determine, on a case-by-case basis and in light of foreign policy objectives, the amenability of foreign sovereigns to suit in the courts of the United States.

---

[15]FSIA Report, *supra*, at 6606-07.
[16]*Id.* at 6611.

Because Congress, in the FSIA, has indeed expressed dissatisfaction with executive intervention in private commercial disputes involving foreign states, and, in another recent statute, the IEEPA, discussed *infra*, has curtailed executive control over foreign property, notwithstanding national emergencies, the test to be applied to the executive actions at issue here is the third and most restrictive standard of review espoused in Justice Jackson's *Youngstown* concurrence: "[C]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject . . . . leav[ing] presidential power most vulnerable to attack and in the least favorable of possible constitutional postures." 343 U.S. at 637-40 (Jackson, J., concurring).[17]

In addition to its contentions concerning the President's inherent constitutional power, the Government contends that certain of President Carter's actions are authorized by statute — specifically by IEEPA. The Government points to this statute as authority for the President's ordering all Iranian property released from judicial attachments and judgment levies and transferring all such property, even property se-

---

[17]If, as the Government has argued below, the President has essentially unlimited power in conducting foreign affairs to use and dispose of as he will claims or judgments of United States citizens against foreign governments and their agencies, the possible abuses of such a power by future Presidents, however well intentioned, are many and grave. For example, under the "conducting foreign affairs" rationale the Government proffers, there exists no meaningful distinction between "settlement" of American claims against foreign governments and their agencies and "settlement" of claims by foreign governments and their agencies against Americans, as by Executive waiver of defenses or confession of judgments. *Cf. Youngstown*, 343 U.S. at 642 (Jackson, J., concurring) ("But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture").

curing claims which were not "settled" by the President,[18] out of the country and out of the reach of United States courts.[19]

Prior to 1977, the President's statutory powers to react to peacetime, international emergencies derived from Section 5(b) of the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1, *et seq.* TWEA conferred upon the President a broad variety of powers designed to prevent the transfer of foreign-held assets in the United States to hostile foreign nations and to secure those assets for the benefit of American creditors. *See Zittman v. McGrath*, 341 U.S. 470, 473-74 (1951); *Propper v. Clark*, 337 U.S. 472, 481, 484 (1949). A subsidiary purpose was to provide for a fair method of distribution of foreign assets among American creditors when such assets were inadequate to satisfy fully all outstanding American claims. *See* 50 U.S.C. App. § 34; *Zittman v. McGrath*, 341 U.S. at 473-74.

In enacting IEEPA, Congress determined that the Executive's broad wartime powers under TWEA were inap-

---

[18]Under the Algerian Declarations, American claimants with certain forum selection clauses have not had their claims "settled." The United States contends that these claimants may continue to litigate in United States courts but their attachments or other judicial liens are vacated. Executive Order No. 12,294, reprinted in Appendix at A-52.

[19]That contention raises serious constitutional questions with respect to Executive Branch interference with proceedings before, and nullification of orders of, an Article III court. *See Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran*, 508 F. Supp. 1350 (N.D. Tex.), *petition for writ of cert. filed*, No. 80-2035 (1981). These constitutional problems are discussed in the petition for writ of certiorari filed by Electronic Data Systems, No. 80-2035, and are not further discussed here.

propriate in peacetime emergencies. Congress observed that TWEA had become "essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review." H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) ("IEEPA House Report"). To limit the breadth of executive authority, IEEPA substituted a "new set of international economic powers, *more restricted than those available during time of war . . . .*" *Id.* at 10 (emphasis added).

IEEPA authorizes the President to regulate international economic transactions when this country is confronted with a declared national emergency arising from "any unusual or extraordinary threat [from exterior forces] . . . to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). The Government contends that the "asset release and transfer" order in issue here is authorized by Section 1702(a), which provides that upon declaration of a national emergency, the President may:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

Id. § 1702(a)(1)(B).

This language, taken nearly verbatim from Section 5(b) of TWEA, is sweeping in breadth — which is unexceptional in light of its original purpose in TWEA: to grant to the President all possible authority to keep assets out of the hands of hostile foreign nations during a war. There is, however, at least one obvious limit to Section 1702(a) of IEEPA; it cannot sensibly be understood to authorize the

Executive to do what he could not do under Section 5(b) of TWEA, from which it is derived.

Under TWEA, the President possesses authority not only temporarily to freeze or block the transfer of foreign-owned assets in the United States, but also summarily to seize such assets, 50 U.S.C. App. § 7, and vest title to them in the United States. *Id.* § 5(b). Despite this more expansive authority, however, the President could not agree to immunize foreign assets from judicial attachment and levy to the detriment of American claimants and creditors and order those assets transferred beyond the jurisdiction of the United States to the benefit of the foreign debtor. Under TWEA, American creditors of foreign nationals (and, following enactment of the FSIA, foreign governments and their agencies) whose assets are held or vested by the Executive are entitled to file with the Executive their claims against the foreign debtor and to be paid out of those assets or their proceeds. *Id.* §§ 9, 34.[20] The protection and satisfaction of

---

[20]Section 9(a) provides that:

> Any person not an enemy . . . to whom any debt may be owing from an enemy . . . whose property . . . shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said Custodian a notice of his claim . . .; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held . . . or of the interest therein to which the President shall determine said claimant is entitled . . . . *If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice . . . required and shall have made no application to the President, said claimant may institute a suit in [federal court] . . . to establish the . . . debt so claimed, and if so established the court shall order the payment,* conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the Court shall determine said claimant is entitled . . . .

the claims of American creditors was a major legislative purpose of TWEA. *See Zittman v. McGrath*, 341 U.S. at 473-474; *Propper v. Clark*, 337 U.S. at 484. This Court's discussion in *Zittman* of the relationship between Section 5(b) of TWEA and the statutory protections that TWEA provides for the claims of American creditors refutes any contention that the President under TWEA has any authority to immunize otherwise attachable and executable foreign assets to the prejudice of American creditors and direct them transferred beyond this country's jurisdiction:

> While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of . . . foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States," *it is not for a confiscation measure, but a liquidation measure for the protection of American creditors*. [TWEA, § 5(b).] It [§ 34] provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts. If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in [federal court]. The transfer of possession of these funds does not purport to work any automatic depri-

---

50 U.S.C. App. § 9(a) (emphasis added).

Section 34(a) provides that:

> Any property or interest vested in or transferred to the Alien Property Custodian . . . *shall be* equitably applied by the Custodian . . . *to the payment of debts owed* by the person who owned such property or interest immediately prior to its vesting in or transfer . . . .

Id. § 34(a) (emphasis added). Section 34 also provides for a claims procedure, for priority and *pro rata* distribution among creditors when assets of the foreign debtor are insufficient to satisfy all valid claims, and for judicial review of administrative denial of claims.

vation of rights of any class of creditors, but takes over the estate for administration.

341 U.S. at 473-74 (emphasis added, footnotes omitted).

The Government's contention that the President's action is authorized by the broad language of IEEPA thus reduces to the absurd proposition that the President has more authority under Section 1702(a) of IEEPA than he has under the identical language of Section 5(b) of TWEA — this notwithstanding the fact that the very reason for enacting IEEPA was to restrict the President's former authority under TWEA. *See* IEEPA House Report, *supra*, at 7. The language of Section 1702(a), like any other word, phrase or section of a statute, draws its meaning from the context of the entire statute and the legislative purposes for which it was enacted.[21] Under TWEA, the same language did not authorize executive action in derogation of the rights and interests of American creditors for the benefit of foreign debtors, and to construe Section 1702(a) to permit such action flies in the face of the very legislative reason for enacting TWEA and IEEPA. By releasing property from Petitioner's attachments and judgment levies and by ordering them "transferred" and "withdrawn" to foreign locations, the Executive neither keeps the assets out of the control of a hostile foreign power nor secures them for the benefit of American creditors. Rather, the Executive effectuates the contrary and perverse result of defeating legal

---

[21]This Court has cautioned against overly literal interpretations of TWEA's language:

> The concern of the Trading With the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes.

Guessefeldt v. McGrath, 342 U.S. 308, 319 (1952).

rights and property interests of American creditors to the benefit of the foreign government.

Moreover, IEEPA specifically revoked the Executive's power under TWEA to "seize" and "vest" foreign assets. *Compare* 50 U.S.C. App. § 5(b)(1) *with* 50 U.S.C. § 1702(a). The House Report emphasizes that IEEPA removes the authority of the President in time of national emergency short of war to "vest any property or interest of any foreign country . . . and to hold, use, administer, sell, or otherwise deal with 'such interest or property' in the interest of and for the benefit of the United States." IEEPA House Report, *supra*, at 2. It seems most unlikely that Congress intended to authorize the Executive to give away foreign assets securing claims of United States creditors in the very statute enacted to prohibit him from seizing the same assets to benefit United States creditors.

Conclusion.

For the foregoing reasons, a Writ of Certiorari to the Court of Appeals for the Ninth Circuit before judgment should be granted, and the Order of the District Court filed May 28, 1981, entered June 2, 1981, should be reversed.

Dated: June 10, 1981.

Respectfully submitted,

C. STEPHEN HOWARD,
Counsel of Record,
MERLIN W. CALL,
MILES N. RUTHBERG,
WILLIAM C. SCHWEINFURTH,
JEFFREY M. HAMERLING,
TUTTLE & TAYLOR Incorporated,
Attorneys for Petitioner
Dames & Moore.

Of Counsel:

STANLEY C. FICKLE